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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 688

JOHN IKE GRIFFITH and J. ROBERT HUIE,
Petitioners

v.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,
Respondent

BRIEF OF RESPONDENT

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Respondent

BRIEF OF RESPONDENT

INTRODUCTION

This Brief of Respondent is filed in opposition to a Petition for Writ of Certiorari to the Supreme Court of Alabama. The Petitioners, John Ike Griffith and J. Robert Huie, duly licensed as attorneys at law by the Supreme Court of Alabama, in disciplinary proceedings brought against them by The Alabama State Bar, thwarted the efforts of the General counsel of The Alabama State Bar to propound any questions to them by refusing to take the stand. The Honorable J. Edgar Bowron, Presiding Judge, Tenth Judicial Circuit of the State of Alabama, adjudged the Petitioners in continuing contempt of court and ordered their confinement until willing to take the stand. (R. JIG, pp. 29-30; R. JRH, p. 16)[1] The Supreme Court

[1]The Respondent will adopt the symbol references used by the Petitioners, namely, 6 Div. 194, John Ike Griffith, as R. JIG, p._____, and 6 Div. 195, J. Robert Huie, as R. JRH, p._____ Appropriate page references will be made to the Appendix to the Petition for Writ of Certiorari.

of Alabama affirmed these judgments and orders in Case Number Sixth Division, Number 164, as to the Petitioner, **John Ike Griffith,** and in Case Number Sixth Division, Number 165, as to the Petitioner, **J. Robert Huie.** (JIG, Appendix, pp. A1-A13; JRH, Appendix, pp. A14-A23).

JURISDICTION

The Petitioners seek to invoke jurisdiction under 28 U.S. Code, Sec. 1257(3), and cite two cases, **Cohen v. Hurley,** 366 U.S. 117, and **Malloy v. Hogan,** 378 U. S. 1. The Petitioners attempt to read into **Malloy v. Hogan,** supra, a holding that is not contained therein, namely, that an attorney subject to disciplinary proceedings may prevent the propounding of any questions to him by refusing to take the stand upon the grounds that some unidentified question which might be asked would possibly tend to incriminate him. As will be hereinafter demonstrated, the Respondent respectfully submits that **Malloy v. Hogan,** supra, is subject to no such interpretation.

QUESTIONS PRESENTED

The Petitioners have presented three questions. The Respondent submits that the questions presented are more clearly stated as follows:

QUESTION A. Where a witness has failed to claim any constitutional privilege against self-incrimination before the courts of a state will certiorari lie where he asserts such privilege for the first time in his Petition for Writ of Certiorari?

QUESTION B. Does the privilege against self-incrimination of Amendment V, Constitution of the United States, as said Amendment is made applicable to the State of Alabama by Amendment XIV, Constitution of the United States, permit an attorney subject to disciplinary proceedings to refuse to take the stand and thus prevent

the propounding of any questions to him upon the attorney's speculation that some question which might be propounded would tend to incriminate him, or must such privilege be exercised in connection with specific questions propounded?

QUESTION C. Do the due process and equal protection clauses of Amendment XIV, Constitution of the United States, permit an accused attorney in disbarment proceedings to refuse to take the witness stand and thus prevent the propounding of any questions to him upon the attorney's speculation that some question which might be propounded would relate to confidential communications between attorney and client, or must such privilege be exercised in connection with specific questions propounded?

QUESTION D. Where an attorney subject to disciplinary proceedings by a state bar association fails to challenge before the courts of Alabama the constitutionality of the Rules Governing the Conduct of Attorneys pursuant to which proceedings were had against him, will certiorari lie where he attacks the constitutionality of such Rules for the first time in his Petition for Writ of Certiorari?

QUESTION E. Do the due process and equal protection clauses of Amendment XIV, Constitution of the United States, preclude disciplinary procedures against an attorney pursuant to Rules Governing the Conduct of Attorneys promulgated by a Board of Commissioners and approved by the Supreme Court of Alabama, which Rules prohibit an attorney from filing an action for divorce with knowledge or reasonable cause to believe that neither party is a bona fide resident of the State where the statutes and decisions construing said statutes require that one party to a divorce proceeding must be a bona fide resident of the state although the statute prescribes no specific period of time to establish residence?

STATUTES AND RULES INVOLVED

In addition to the constitutional provisions, statutes and rules set forth in the Appendix to the Petition for Writ of Certiorari, the Respondent calls the following to the attention of the Court:

I

Amended Rules Governing Conduct of Attorneys in Alabama, Rule B(12):

> PRESIDENT'S ORDER FIXING DATE, AND BY WHOM TESTIMONY TAKEN The evidence may be taken either (a) by the Grievance Committee of the Board, or (b) by a Commissioner designated by the President, or (c) by the Board, and the President shall determine whether the evidence shall be taken by the Grievance Committee of the Board or by a Commissioner or by the Board. The President shall thereupon make and cause to be filed with the Secretary an order fixing a date for taking the evidence upon the said complaint.

II

Amended Rules Governing Conduct of Attorneys in Alabama, Rule B(19):

> SUMMONING WITNESSES: PRODUCTION OF PAPERS Witnesses may be summoned by the Board, its President, its Secretary, any Grievance Committee, any Chairman of a Grievance Committee, or by the Commissioner, their appearance and testimony required, the oath administered, depositions taken, and the production of books, papers and other documents required in all respects as provided by law.

III

Title 46, Section 35, Code of Alabama, 1940:

> POWER OF SUBPOENA — In the investigation of charges of professional misconduct, the board, and any committee appointed by it for this purpose shall have power to summon and examine witnesses under oath and compel their attendance and the production of books, papers, documents and other writings necessary or material to the inquiry. Such summons or subpoena shall be issued under the hand of the secretary of the board or the chairman of any duly constituted sub-committee of the board, and shall have the force of a subpoena issued by a court of competent jurisdiction, and any witness or other person who shall refuse to be sworn or testify or produce books, papers, documents or other writings demanded shall be liable to attachment upon application to the supreme court of the state or to any judge of any court of record for the district where the investigation is conducted as in cases of contempt.

STATEMENT OF THE CASE

The Statement of the Case contained in the Petition for Writ of Certiorari sets forth accurately and chronologically the general nature of the pleadings filed and the hearings conducted in these proceedings, but omits certain details which the Respondent deems pertinent.

The charges filed by the Grievance Committee of The Alabama State Bar against the Petitioner, John Ike Griffith, on July 10, 1965 (R. JIG, pp. 32-41); as amended on January 15, 1965 (R. JIG, pp. 43-45); and as further amended on January 15, 1965 (R. JIG, pp. 46-59) allege that said attorney was guilty of violating or failing to comply with Rule 25 of Section A and Rule 36 of Section A of

the Rules Governing the Conduct of All Persons Admitted to the Practice of Law in the State of Alabama. (Appendix B, pp. A31-A32). This attorney was charged with acting as referring or forwarding attorney in obtaining approximately 325 divorces. Flagrant violation of the Rules was charged in the following language:

> ". . . the said Attorney, while serving as referring or forwarding attorney, did, in association with one Neil Metcalf, submit to the Inferior Court of Geneva County, Alabama, approximately fifteen divorce cases. . . . and in said cases served as referring or forwarding attorney for the complainant where in the bill of complaint represented to the Inferior Court of Geneva County, Alabama, that either the complainant or respondent was a bona fide resident of the State of Alabama, when, in truth and in fact, the said Attorney knew or had reasonable cause to believe that in one or more, if not all, of said cases, neither the complainant nor the respondent was a bona fide resident of the State of Alabama."

> " . . . (b) That the said Attorney maintained an office in Birmingham, Jefferson County, Alabama, a short distance from the Circuit Court of said County, whose Equity Docket in divorce matters has been current from October 24, 1961, to the date of the filing of this complaint, whereas, the Inferior Court of Geneva County, Alabama, is located approximately 240 miles from the office maintained by the Said Attorney. Moreover, the Circuit Court of Jefferson County, Alabama, has maintained a strict vigilance in answer and waiver divorce matters, whereas the Inferior Court of Geneva County, Alabama, became known throughout the State of Alabama, prior to and during the time specified in this complaint as a haven of rest for those who were not bona fide residents of

the State of Alabama, to obtain a divorce by an allegation that they were residents of Alabama for such length of time as required by law, coupled with an answer and waiver.

That from September 1, 1962, through August 31, 1963, the Circuit Court of Geneva County, Alabama, granted ten divorces.

That from October 24, 1961, to August 1, 1962, the Inferior Court of Geneva County, Alabama, granted 3080 divorces on bill of complaint and answer and waiver. These cases were reported to the Bureau of Vital Statistics of the State of Alabama as required by law. Much publicity was given to the fact and it became common knowledge not only among the members of the Bar but the public as well, that the Inferior Court of Geneva County, Alabama, was operating what is commonly called a 'quickie divorce mill'. On July 16, 1962, the Bar of Alabama issued a warning to the Judge of said Court and some of the four attorneys who appeared personally before the Court, that Rule 25A, as last amended, was being flagrantly violated.

Thereafter, from August 1, 1962, to September, 1963, the Inferior Court of Geneva County, Alabama, granted 2,740 divorces on bill of complaint and answer, and virtually none of these cases were reported to the Bureau of Vital Statistics of the State of Alabama, as required by law.

These divorce cases granted during the period aforesaid were hidden from the public view, locked in an office disconnected with that of the Register of the Court, where no one was employed.

On the 1st day of August, 1962, a special docketing system was created for the only four lawyers per-

sonally appearing before and obtaining divorces in said Court, as follows:

The B Docket, the C Docket and the D Docket.

B-100 through B-749, representing 650 divorce cases submitted during said period by Boswell and Smith, of Geneva, Alabama; C-100 through C-1352, representing 1253 divorce cases submitted during said period by Neil Metcalf, of Geneva, Alabama;

D-100 through D-849, representing 750 divorce cases submitted during said period by Ned Moore, of Opp, Alabama. During this time the Register of the Inferior Court of Geneva County, Alabama, maintained a docket "A", open to the public, but none of the B, C and D cases were reflected thereon, and a complete search of the Register's Office would not reveal any of the B, C and D docketed cases. As a result of this system the public, the press and the Grievance Committee of the Alabama Bar, notwithstanding investigation, was kept completely in the dark as to the activities of said Court.

Despite all this, the said Attorney, in association with Neil Metcalf, did obtain approximately fifteen divorces in said Court throughout the entire period of time specified in this complaint, and in order to hide his identity and participation in said cases did not sign the pleadings. This number of divorces obtained by the said Attorney exceeded the number of divorces granted by the Circuit Court of Geneva County, Alabama, from September 1, 1962, through August 31, 1963, viz: ten divorces . . . ."

". . . serving as referring or forwarding Attorney for the complainant, obtained approximately Forty-One divorces in the Law and Equity Court of Winston

County, Alabama, Haleyville Division, all answer and waiver, as set forth on Exhibit "A" (attached hereto and made a part hereof with leave of reference thereto for all purposes) under the circumstances, hereinafter set forth in (b), and that said Attorney knew or had reasonable cause to believe that in one or more, if not all, of said cases that neither the complainant nor the respondent in said cases was a bona fide resident of the State of Alabama as represented in said cases to the Law and Equity Court of Winston County, Alabama, Haleyville Division. (b) That said Attorney maintained an office in Birmingham, Jefferson County, Alabama, a short distance from the Circuit Court of said County, whose Equity Docket in divorce matters has been current from October 24, 1961, to the date of the filing of this Complaint, whereas the Law and Equity Court of Winston County, Haleyville Division, is located approximately 90 miles from the office maintained by said Attorney. Moreover, the Circuit Court of Jefferson County, Alabama, has maintained a strict vigilance in answer and waiver divorce matters, whereas the Law and Equity Court of Winston County, Haleyville Division, became known, prior to and during the time specified in this Complaint, as a haven of rest for those who were not bona fide residents of the state of Alabama, to obtain a divorce by an allegation that they were residents of Alabama for such length of time as required by law (or a similar allegation), coupled with an answer and waiver.

In an effort to conceal his identity and his participation in said cases he did not sign the pleadings but the same were submitted pro se without stating the address of the pro se party complainant. . . ."

". . . the said attorney did submit to the Circuit Court of Marion County, approximately 269 divorce cases,

and in said cases, served as attorney for the complainant wherein the Bill of Complaint represented to said Courts that either the complainant or respondent was a bona fide resident of the State of Alabama, when in truth and in fact, said attorney knew or had reasonable cause to believe that in one or more, if not all of said cases, that neither the complainant nor respondent was a bona fide resident of the State of Alabama. . . ."

The charges filed by the Grievance Committee of the Alabama State Bar against the Petitioner, **J. Robert Huie**, on May 20, 1965 (R. JRH, pp. 20-28); as amended on January 15, 1965 (R. JRH, pp. 29-32) contain allegations substantially identical to the above quoted language, avering that this attorney served as referring or forwarding attorney in submitting 76 divorce cases to the Inferior Court of Geneva County, Alabama, and 11 divorce cases to the Circuit Court of Marion County, Alabama, wherein the bill of complaint represented to the Court that either the complainant or respondent was a bona fide resident of the State of Alabama, when, in truth and in fact, he knew or had reasonable cause to believe that neither the complainant nor the respondent was a bona fide resident of the State of Alabama.

Pursuant to Rule B (12) of the Rules Governing the Conduct of Attorneys in Alabama, the President of The Alabama State Bar caused to be filed with the Secretary on January 25, 1965, his Orders appointing a Commissioner to take the testimony of each Petitioner. Orders provided for the taking of the testimony of **John Ike Griffith** on February 9, 1965, at 10:00 A.M. (R. JIG, p. 60), and that of **J. Robert Huie** on February 10, 1965 (R. JRH, p. 39), both hearings to be held at the Courthouse, Birmingham, Alabama.

Pursuant to Rule B (19) of the Rules Governing the Conduct of Attorneys in Alabama, the Secretary of the

Board of Commissioners issued a subpoena duces tecum to each Petitioner, commanding the production at the time and place appointed for the taking of his testimony, of certain books, records and correspondence pertaining to the numerous divorces which each had obtained. (R. JIG, pp. 61-62; R. JRH, pp. 40-41).

The General Counsel of The Alabama State Bar caused each Petitioner to be served with a Notice to Take Deposition advising of the taking of his deposition at the time and place designated. (R. JIG, p. 6; R. JRH, p. 5)

Each Petitioner filed a Motion to Quash Service of Notice to Take Deposition (R. JIG, pp. 63-64; R. JRH, pp. 44-45) and a Motion to Quash Service of Subpoena Duces Tecum. (R. JIG, pp. 65-66; JRH, pp. 42-43)

On February 9, 1965, at 10:00 A.M. in the Jefferson County Courthouse, Birmingham, Alabama, Hon. Timothy M. Conway, the Commissioner appointed to take the testimony of Petitioner, John Ike Griffith, convened the hearing for this purpose. Hon. Matt H. Murphy, Jr., attorney for the Petitioner, appeared on his behalf and after argument of counsel, the Commissioner overruled the above described Motion to Quash Service of Notice to Take Deposition and Motion to Quash Service of Subpoena Duces Tecum. (R. JIG, p. 7). The attorney then declined on his behalf for the Petitioner to appear and declined on his behalf for him to give any testimony.

On February 10, 1965, identical proceedings were followed in the case of the Petitioner, J. Robert Huie. (R. JRH, p. 6)

Warrants were issued for each of the Petitioners (R. JIG, p. 9; R. JRH, p. 8) and on February 9, 1965, certain proceedings were had before the Honorable J.

Edgar Bowron, Presiding Judge of the Circuit Court of Jefferson County, Alabama, (Tenth Judicial Circuit) in the Matter of Petitioner, John Ike Griffith. (R. JIG, pp. 10-24). This Petitioner filed a Motion to Quash Attachment. (R. JIG, pp. 11-13). The Petition for Writ of Certiorari sets forth verbatim paragraphs 3 and 4 of this Motion to Quash Attachment. (Petition for Writ of Certiorari, pp. 8-9). In substance, paragraph 4 of said Motion asserts that by testifying the Petitioner "might incriminate his own client", and that as an attorney, he has a duty "to maintain inviolate the confidence and preserve the secrets of his client". Paragraph 4 contains a general allegation that the Petitioner is being denied his rights under the due process clause of the Constitution of the United States of America. It should be noted that the Motion to Quash Attachment is devoid of any general or specific reference to the Petitioners' rights against self-incrimination.

In response to the argument that the Petitioner by testifying might be required to divulge confidential information imparted to him by his client, the Court observed:

> "THE COURT: I think now maybe you are making argument on behalf of objections to questions which you anticipate may be asked:
>
> MR. MURPHY: I am trying to make a motion, Your Honor.
>
> THE COURT: I realize that that can come in at this stage, as far as the motion to quash and it can come in again when the question is asked of the witness." (R. JIG, p. 16)

At the conclusion of argument the Court overruled the Motion to Quash Attachment. (R. JIG, p. 22)

On February 10, 1965, the Petitioner, John Ike Griffith, again appeared before the Honorable J. Edgar Bowron, together with his attorney, Matt H. Murphy, Jr., at which time Timothy M. Conway, the Commissioner appointed to take Petitioner's testimony, informed the court of his continued refusal to take the witness stand, (R. JIG, p. 25) the Commissioner stating to the court:

> "MR. CONWAY: . . . as a part of his objection, he was taking the position that the interrogation would invade the attorney-client privilege. It was my opinion that the objections with respect to that point were premature, and that such objections would necessarily have to be made at the time the questions were asked which tend to invade the attorney-client privilege, . . ."

Argument was again heard, Petitioner's counsel and the court stating:

> "MR. MURPHY: . . . Now, under these charges—actually they are charges which involve charges under Rule 25 (a) in which the sole question is the residence or non-residence of complainants or respondents in divorce actions, and we say that in this case the client is so closely connected with the defendant that it is like two balls and chains being tied together, and that if this accused attorney takes the stand, or should he say anything in regard to a mental operation wherein they have been in and have left, and he should have knowledge of such a thing, it would certainly betray the secrets of his client—
>
> THE COURT: Excuse me for interrupting, but aren't you speculating on questions that are going to be asked?
>
> MR. MURPHY: Yes, sir. And on those grounds we respectfully say, with no disrespect to the Court—

THE COURT: I understand.

MR. MURPHY: We say that he declines to take the stand. . . ." (R. JIG, p. 27)

The Court ordered the Petitioner to take the witness stand and he again refused, stating his reason therefor as reflected in the following excerpt from the record:

"MR. GRIFFITH: Your Honor, may it please the Court, I express my respect to this Honorable Court, and express my respect to the Alabama Bar Association and the Board of Commissioners, and out of no manner of defiance or to violate their rules and regulations, but I respectfully decline to take the stand, and for the reason cite Title 46, Section 43, paragraph 4, wherein the Code of Alabama binds my hands to maintain inviolate the secrets of my clients, and that the charges that have been preferred against me by the Board are obvious and clear that the testimony desired to be adduced from the witness or from myself, would violate the confidences of my clients, and for that reason I decline to take the stand and testify, and for the further reason that Title 46, Section 50, paragraph three, wherein it states that should I violate the secrets and the confidences of my client that I may be disbarred for doing so, and for the further reason that I have studied the charges against me, and I have consulted legal counsel and I have been advised by legal counsel that I am not required to take the stand and advised not to take the stand, and that I respectfully obey the counsel of my own lawyer in that respect, and I further cite as grounds for my refusal to take the stand the contents or the substance of Title 46, Section 35, and Title 46, Section 50, and, Your Honor, I beg to be excused from taking the stand.

THE COURT: Before you sit down, Mr. Griffith, you fully understand that you, as an attorney, are an officer of the Court?

MR. GRIFFITH: Yes, Your Honor.

THE COURT: And, regardless of that relationship, having been ordered and requested by the Court to take the stand, you refuse on the basis of the statement which you have just made?

MR. GRIFFITH: That is right; Your Honor. . ." (R. JIG, pp. 28-29)

Note that the Petitioner did not base his refusal to take the witness stand upon any right against self-incrimination guaranteed him by the Constitution of the United States or the Constitution of the State of Alabama.

The Court thereupon entered the following order:

"RE: IN THE MATTER OF JOHN IKE GRIFFITH, ATTORNEY AT LAW

2/10/65: The witness, John Ike Griffith, having been brought into Court by a writ of attachment and having been called as a witness by the Court and having declined and refused to take the stand as a witness for reasons indicated by said witness, the Court adjudges said witness in continuing contempt of Court for failure to take the stand and orders a confinement in the Jefferson County jail until such time as he is willing to conform to the order of the Court and take the stand as a witness. The Court suspends the confinement of said witness and recognizes him on his own bond or bail to permit a review of the order of the Court adjudging him in contempt of Court, providing that said review in whatever manner is proper and legal be promptly processed and for-

warded to the reviewing authorities. An exception is noted on behalf of the Commissioner, the Board of Commissioners, and the respondent, or witness, John Ike Griffith." (R. JIG, pp. 29-30)

On February 10, 1965, a similar hearing was held before the Honorable J. Edgar Bowron in the matter of the Petitioner, J. Robert Huie. This Petitioner also filed a Motion to Quash Attachment identical in content to that filed by the Petitioner, J. Ike Griffith. (R. JRH, pp. 10-12) In argument counsel for this Petitioner stated:

"MR. MURPHY: . . . we say that under Title 46, Section 43, in view of the nature of these charges in that they relate to a divorce case or cases in which it is claimed in the complaint that complainant nor respondent neither one were ever a bona fide resident of the State of Alabama, and that the two are tied so closely together that there is such a connection between lawyer and client in that the client could be prosecuted in connection with perjury . . . .

. . . this defendant is being denied the right of due process of law under Article One, Section Six of the Constitution of the State of Alabama, and under the Due Process Clause of the Constitution of the United States of America. . ." (R. JRH, p. 15)

The Court ordered this Petitioner to take the stand and he refused to do so, his reasons therefor being reflected in the following excerpt from the record:

"THE COURT: . . . All right, Mr. Murphy, the Court will overrule your objections, and I note an exception on behalf of you and your clients, and I now ask the witness to take the stand.

MR. MURPHY: Your Honor, the witness declines to take the stand on the same grounds as stated in Mr. Griffith's case.

THE COURT: All right. I will ask you, Mr. Huie, if you are aware that you, as an attorney licensed to practice law in the State of Alabama, are an officer of the Court?

MR. HUIE: Yes, sir; Your Honor, I realize that.

THE COURT: And your decision not to take the stand is made fully with the understanding that you are an officer of the Court?

MR. HUIE: Upon the advice of my attorney, and with all due respect to the Court, in view of the statement that Mr. Murphy has just made, I respectfully decline to take the stand . . ." (R. JRH, p. 16)

Note that this Petitioner did not base his refusal to take the witness stand upon any right against self-incrimination guaranteed him by the Constitution of the United States or the Constitution of the State of Alabama.

The Court thereupon made following statement:

"THE COURT: I won't give you all an order, but the order will be identical in each case: Under the circumstances, the witness declining to take the stand as a witness, having been ordered to do so by the Court, the Court will hold the witness, J. Robert Huie, in contempt, continuing contempt, and adjudicate that you are to be confined in the Jefferson County jail until such time as you are willing to conform to the order of the Court and take the stand as a witness. The court suspends the confinement of said witness and recognizes you on your own bond or bail to permit a review of the order of this Court adjudging you in contempt of Court, providing that said review in whatever manner is proper and legal be promptly processed and forwarded to the reviewing authorities. And we note an exception to this ruling, separately and severally, to you and your counsel of record,

and I, therefore, Mr. Huie, recognize you on your own bond and this case is continued until March 1, 1965, at 2:00 p.m., Room 306, courthouse." (R. JRH, p. 16)

ARGUMENT
QUESTION A

Where a witness has failed to claim any constitutional privilege against self-incrimination before the courts of a state will certiorari lie where he asserts such privilege for the first time in his Petition for Writ of Certiorari?

The most thorough and painstaking examination of the record will fail to reveal wherein the Petitioners in any manner apprised the Commissioner appointed to take their testimony or the Judge who held them in contempt for refusal to take the witness stand that their refusal to take the witness stand was based upon any claim of privilege against self-incrimination. Each Petitioner filed a Motion to Quash Attachment containing a general and indefinite reference to the due process clauses of the Constitution of the State of Alabama and the Constitution of the United States. However, this general statement is controlled and rendered definite by specific argument of counsel and by the specific statement made under oath by the Petitioner, **John Ike Griffith**, and adopted under oath by the Petitioner, **J. Robert Huie**, upon his refusal to comply with the court's order to take the witness stand. (R. JIG, pp. 28-29) In essence, the Petitioners refused to take the stand because of an alleged privilege and duty not to divulge confidential information imparted to them by their clients, referring to a specific Alabama statute on this point, and referring to another Alabama statute which makes the wilful violation of such duty a cause, not for criminal prosecution, but for disbarment.

The record is such that neither the Commissioner, nor Judge, could possibly have surmised that the Petitioners refused to take the witness stand because of a claim of privilege against self-incrimination.

The Opinion in Ex-parte Griffith, 178 So. 2d 169 (Ala. 1965) (Appendix A, pp. A1-A13) makes no mention whatsoever of the privilege against self-incrimination since no issue concerning the same was before the court. The Opinion in Ex-parte Huie, 178 So. 2d 156 (Ala. 1965) (Appendix A, pp. A14-A23) makes mention of a reference in Petitioners' Reply Brief before the Alabama Supreme Court to the privilege against self-incrimination as guaranteed by the Constitution of the State of Alabama. Having failed to invoke the privilege in the proceedings before the Commissioner and the Circuit Judge an issue concerning the same could not be injected for the first time on appeal. The Opinion concludes, however, that such privilege would not permit the Petitioner to refuse to take the stand, and that the court would not speculate concerning specific questions prior to the propounding of any questions.

In Quinn v. United States, 349 U. S. 155, this Court held that a witness, under the facts and circumstances of that case, had validly invoked the claim of privilege, stating that:

> ". . . . a claim of the privilege does not require any special combination of words."
>
> ". . . . the fact that a witness expresses his intention in vague terms is immaterial so long as the claim is sufficiently definite to apprise the committee of his intentions . . ."
>
> ". . . no ritualistic formula is necessary in order to invoke the privilege . . ." (emphasis added)

In a companion case, **Emspak v. United States, 349 U. S. 190**, the Court stated:

> ". . . . no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination."

The Petitioners did not express their intentions in vague terms. The Petitioners, attorneys at law and presumedly cognizant of their legal rights, upon refusing to comply with the court's order to take the witness stand, stated their specific grounds therefor, referring to three Alabama statutes completely unrelated to the subject of self-incrimination, and there was nothing in the record to give the Commissioner or Judge any hint that they relied upon this Constitutional right.

In **United States v. Monia, 317 U. S. 424**, the court held that no claim of privilege against self-incrimination was necessary on behalf of a witness appearing before a grand jury inquiring into an alleged violation of the Sherman Act in order to obtain immunity from prosecution. However, concerning the general requirement that the privilege must be validly claimed the Court stated:

> "The Fifth Amendment declares that 'No person . . . shall be compelled in any criminal case to be a witness against himself.' An investigation by a grand jury is a criminal case. The amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."

In **United States v. Vajtauer, 273 U.S. 103**, the court affirmed the action of a district court in dismissing a writ

of habeas corpus issued to determine the validity of an order for deportation. An alien had been sworn, answered certain questions, and refused to answer other questions until the evidence upon which a warrant had issued was presented. On appeal he asserted that he had been denied the rights guaranteed him against self-incrimination. With regard to his failure to assert his claim, the court stated:

> ". . . It is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him, Mason v. United States, 244 U.S. 362, 61 L.ed. 1198, 37 Sup. Ct. Rep. 621, a determination which it cannot make if not advised of the contention. Cf. Re Edward Hess & Co. (D. C.) 136 Fed. 988; Ex parte Ervine (C. C.) 74 Fed. 954, 960. The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it."

The Petitioners refused to take the witness stand for certain clearly expressed reasons unrelated to any claimed privilege against self-incrimination, and they cannot be heard to belatedly assert such claim now.

QUESTION B

Does the privilege against self-incrimination of Amendment V, Constitution of the United States, as said Amendment is made applicable to the State of Alabama by Amendment XIV, Constitution of the United States, permit an attorney subject to disciplinary proceedings to refuse to take the stand and thus prevent the propounding of any questions to him upon the attorney's speculation that some question which might be propounded would tend to incrimi-

nate him, or must such privilege be exercised in connection with specific questions propounded?

Admitting, arguendo, that the Petitioners had invoked a constitutional privilege against self-incrimination — a privilege which they did not rely upon — such privilege could, in no event, stifle all efforts of the counsel for the Alabama State Bar to question them.

The Petitioners were not under indictment by the State of Alabama for the commission of crime. The Petitioners, as attorneys, were charged with unethical conduct by the Grievance Committee of The Alabama State Bar for violation of certain Rules Governing the Conduct of Attorneys in Alabama, promulgated by the Board of Commissioners of The Alabama State Bar and approved by the Supreme Court of Alabama.

> "The privilege (against self-incrimination), except in the case of an accused in a criminal case, is merely an option of refusal, not a prohibition of inquiry." 8 Wigmore on Evidence, Section 2268 (McNaughton rev. 1961)

In United States v. Vajtauer, supra, involving a deportation proceeding having a criminal fact as its main issue, it was held that the deportee must take the stand and assert any claim of privilege as to specific questions.

Even the Petitioners do not claim that they occupy the position of defendants under indictment for crime. This is manifest by their freely submitting to the administration of the oath (an act which could not have been exacted from a defendant on trial for a crime), and then stating to the court, under oath, their reasons for refusing to submit to any interrogation.

The Supreme Court of Alabama has held that an action for disbarment of an attorney is not a criminal

proceeding. In Ex parte **Thompson**, 228 Ala. 113, 152 So. 229 (Ala. 1933) the court so stated in holding that an attorney was not entitled to a trial by jury in disbarment proceedings.

Although an issue involving the Petitioners' right against self-incrimination was not before the Supreme Court of Alabama -nor is such issue properly before this Court for that matter – the opinions in Ex parte **Griffith**, 178 So. 2d 169 (Ala. 1965) (JIG, Appendix, pp. A1-A13) and Ex parte **Huie**, 178 So. 2d 156 (Ala. 1965) (JRH, Appendix, pp. A14-A23) cite with approval and quote from Ex parte **Messer**, 228 Ala. 16, 152 So. 244 (Ala. 1933), which held that the provision of the Alabama Constitution providing that in all "criminal prosecutions" the accused has a right to be confronted by the witnesses against him did not preclude the use of depositions in a disbarment proceeding, the court stating:

> ". . . It is well settled that the rules and principles of the law of evidence applicable to civil proceedings are also applicable to quasi criminal proceedings; that the defendant may be compelled to testify as a witness for the plaintiff, the testimony may be taken by deposition, and the failure of the defendant to testify may be commented on in argument . . ."

The courts of last resort in other states considering the question have uniformly followed this view, and have clearly enunciated the proposition that a disciplinary proceeding against an attorney is not a criminal prosecution as entitles the attorney to decline to testify. See: **Johnson** v. **State Bar of California**, 52 P.2d 928, 4 C.2d 744 (Cal. 1935); **Fish** v. **State Bar of California**, 4 P. 2d 937, 214 C. 215 (Cal. 1931); **Brophy** v. **Industrial Accident Commission**, 115 P. 2d. 835, 46 C.A. 2d 278 (Cal. App. 1941); **McIntosh** v. **State Bar of California**, 274 P. 1067, 211 Cal. 261 (Cal. 1931); **In re Vaughn**, 209 P. 353, 189

Cal. 491, (Cal. 1922); and In re Bailey, 248 P. 29, 30 Ariz. 407 (Ariz. 1926).

The Supreme Court of the United States has upon at least three occasions considered disciplinary proceedings against attorneys as non-criminal in nature.

The case of Randall v. Brigham, 74 U.S. 523, held that a judge was not liable in a civil action for the alleged wrongful disbarment of an attorney, the court expressly approving holdings of the Supreme Court of Massachusetts that certain safeguards afforded by the Massachusetts' Constitution to defendants indicted for crime were unavailable to attorneys in disciplinary proceedings, the opinion containing the following:

> "It has held that the proceeding taken for the removal of the plaintiff could not, in any just and proper sense, be deemed a criminal procedure, in which a party has a right to a full, formal and substantial description of the offense charged; and that it was not essential to the validity of the order of removal that it should be founded on legal process, according to the signification of the words 'per legem terrae', as used in Magna Charta, or in the Declaration of Rights. Randall, Petitioner for Mandamus, 11 Allen, 473. This construction of the highest court of the State, not called in question by any conflicting decision of that court, is conclusive upon us. Prov. Institution v. Mass. 6 Wall. 630, 18 L.ed. 910"

In discharging a rule to show cause why a disbarment order of a United States District Judge should not be vacated, the court in Ex parte Wall, 107 U.S. 265, stated:

> "The proceeding is, in its nature, civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but

> for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them."

Finally, in **Cohen** v. **Hurley**, supra, there is no indication that the attorney was considered to occupy the position of a defendant in a criminal prosecution, and although **Malloy** v. **Hogan**, supra, holds that Amendment XIV, Constitution of the United States, makes Amendment V, Constitution of the United States, applicable to the State of Alabama, there is no hint or suggestion therein that this converts a civil disciplinary proceeding into a criminal prosecution and raises a barrier preventing the judicial department of a state acting through a duly authorized state bar from even questioning attorneys as officers of the courts concerning their fitness.

In the case of **Landy** v. **United States**, 283 F. 2d 303, the United States Court of Appeals, Fifth Circuit, held that a movant was not entitled to have quashed an administrative subpoena of the Internal Revenue Service on the grounds that it might result in questions which the subpoenaed witness could constitutionally refuse to answer. In the opinion, the court observed:

> ". . . The privilege of the Fifth Amendment must be exercised in connection with precise questions and not as a general excuse for refusing to appear in response to subpoena. Rogers v. United States, 340 U.S. 367, 71 S. Ct. 438, 95 L.Ed. 344)."

A careful review of the cases decided by the Supreme Court of the United States involving the Fifth Amendment as applied to witnesses other than defendants under indictment and on trial for crimes, reveals that in each and every case the party invoking the protection of the Fifth Amendment relied upon the right against self-incrimination as it applied to the answer to some specific question.

In no case was the Fifth Amendment considered a bar to the propounding of all questions.

In the case of **Mason** v. **U.S.**, 244 U.S. 362, the court affirmed the action of the District Court of the United States for the District of Alaska in holding a witness before a grand jury in contempt for his failure to answer specific questions. In the opinion, the court quoted with approval from the language of Chief Justice Marshall in the case involving the trial of Aaron Burr, **Re. Willie**, Fed. Cas. No. 14692e, wherein it was stated:

> "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law." (Emphasis added)

In the case of **Hoffman** v. **U.S.**, 341 U.S. 479, 95 L.Ed. 1118, 71 S. Ct. 814, the court sustained the claim of privilege of a witness called to testify in a grand jury investigation in his refusal to testify to a series of specific questions. In the opinion, the court stated:

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute, but likewise embraces those which could furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (Patricia) Blau v. United States, 340 U. S. 159, ante, 170, 71 S. Ct. 223 (1950). But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. Mason v. United States, 244 U. S. 362, 365, 61 L.Ed. 1198, 1199, 37 S. Ct. 621 (1917), and the cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would in-

criminate himself — his say-so does not of itself establish the hazard of incrimination."

In the case of **Rogers v. United States, 340 U.S. 367**, the court held that a witness testifying before a grand jury was not justified in refusing to answer a specific question, primarily because after answering certain prior questions, it was considered that the specific question could not further incriminate her. In the opinion, the Court stated:

> "As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further incrimination."

In the case of **Brown v. Walker, 161 U.S. 591**, the court in commenting upon the obligation of a witness to testify in the absence of a valid claim against self-incrimination, stated:

> "The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

The Petitioners' claim of the privilege against self-incrimination is premature, and the decisions and opinions of the Supreme Court of the State of Alabama do not deprive the Petitioners of any federal constitutional rights.

The Petitioners rely exclusively upon **Malloy v. Hogan**, supra. The argument being that the state standards against

self-incrimination which were applied in **Cohen** v. **Hurley**, supra, are less stringent than the federal standards made applicable to the states by **Malloy** v. **Hogan**. However, there is nothing in **Malloy** v. **Hogan** to indicate that the application of such federal standards would permit an attorney in disciplinary proceedings to refuse to take the witness stand and assert a carte blanche authority to refuse to answer all questions that might be directed to him. **Malloy** v. **Hogan**, does not purport to overrule the holdings that a defendant in non-criminal proceedings cannot refuse to testify. Such a party cannot evade all interrogation even when a criminal fact constitutes the main issue. **United States** v. **Vajtauer**, supra.

Cohen v. **Hurley**, supra, involved a disbarment proceeding against an attorney wherein the attorney refused to answer specific questions. **Malloy** v. **Cohen**, supra, involved a state inquiry into gambling (for which the witness had pleaded guilty and been punished) wherein the witness refused to answer specific questions. Neither the attorney nor the witness refused to to take the witness stand.

Applying federal standards against self-incrimination to the facts of the instant case in no manner alters the result.

QUESTION C

Do the due process and equal protection clauses of Amendment XIV, Constitution of the United States, permit an accused attorney in disbarment proceedings to refuse to take the witness stand and thus prevent the propounding of any questions to him upon the attorney's speculation that some question which might be propounded would relate to confidential communications between attorney and client, or must such privilege be exercised in connection with specific questions propounded?

Had the Petitioners validly claimed privilege against self-incrimination such claim of privilege would have been premature prior to the Petitioners' taking the witness stand. The Petitioners' assertion that Title 46, Section 43(4), Code of Alabama, 1940, raises a privilege as to all questions is equally premature.

The opinion in Ex parte Griffith, 178 So. 2d 169 (Ala. 1965) (JIG, Appendix, pp. A1-A13) correctly observes:

> "It is therefore manifest that the petitioner in refusing to take the stand and testify assumed for himself the right to determine whether his assertion of the doctrine of confidential communications was valid. This was a matter solely within the province of the court to determine. The petitioner's actions in the premises were premature and can furnish no justification for his refusal to testify."

The opinion in Ex parte Huie, 178 So. 2d 156 (Ala. 1965) (JRH, Appendix, pp. A14-A23) observes with equal clarity:

> "Petitioner has not taken the stand and no question has been propounded to him. To say now whether he will be privilege to refuse to answer any question would be sheer speculation. The possibility that a question might call for privileged evidence does not justify petitioner in refusing to take the stand."

Everything heretofore stated concerning the premature nature of any alleged claim of privilege against self-incrimination is of equal applicability with regard to the asserted claim of invasion of the attorney-client privilege.

There are many limitations upon the application of the rule concerning privileged communications, and these are discussed at length in the opinion in Ex parte Griffith, 178 So. 2d 169 (Ala. 1965) (JIG, Appendix, pp. A1-A13).

Numerous questions could well be propounded to the Petitioners which might fall within the exceptions stated. Certainly the due process and equal protection clauses of Amendment XIV, Constitution of the United States, do not preclude the counsel for a state bar association from requiring an attorney in disciplinary proceedings to take the witness stand, or enable the Petitioners by refusing to take the witness stand to preclude the possibility of such questions being propounded.

It is for the court to determine whether a communication between client and attorney is privileged. In People's Bank of Buffalo v. Brown, 112 F. 652 (C. C. A. 3) the court required an attorney to submit to interrogation stating:

> "... There is no presumption of privilege, and though its allowance may, in a clear case, be founded upon the voluntary statement of the attorney that his knowledge of the fact to which he is asked to testify was acquired in a professional confidence, yet, wherever, as in this case, the circumstances suggest that the sufficiency of the grounds of that statement should be considered, it is the right of the opposing party to demand that the proponent of the privilege shall be submitted to such interrogation as may be necessary to test its validity . . ."

> "... The witness declines to answer, not after inquiry and adjudication by the court, but upon his own mere declaration that the matters to which his declination relates were privileged communications, and thus both of the facts and the law he constitutes himself the exclusive judge. The province of the court cannot be thus usurped. If it could be, it is obvious that the rule under consideration, which is designed to promote the administration of justice, might readily be misused for its obstruction, and become, in consequence, too pernicious to be tolerated. . ."

Communications made in connection with the perpetration of fraud upon the court are not privileged. In A. B. Dick Co. v. Marr, 957 F. Supp. 83, the court stated:

> ". . . it is quite clear that the privilege disappears if it is invoked merely to cloak a fraudulent scheme, and that when a client consults an attorney as to how to concoct or perpetrate a fraud the privilege is unavailing. . ."

The due process and equal protection clauses of Amendment XIV, Constitution of the United States, do not stand, as a bar to the Petitioners' taking the witness stand.

QUESTION D

Where an attorney subject to disciplinary proceedings by a state bar association fails to challenge before the courts of Alabama the constitutionality of the Rules Governing the Conduct of Attorneys pursuant to which proceedings were had against him, will certiorari lie where he attacks the constitutionality of such Rules for the first time in his Petition for Writ of Certiorari?

The Petition for Writ of Certiorari is fatally defective insofar as the Petitioners seek to challenge the validity of Rule 25, Section A of the Rules Governing the Conduct of Attorneys in Alabama. In view of the fact that the validity of this Rule was never challenged before the Supreme Court of Alabama, before the Circuit Court of the Tenth Judicial Circuit in and for Jefferson County, Alabama, or before the Commissioner appointed by the President of The Alabama State Bar to take the testimony of the Petitioners, the point cannot now be raised for the first time.

The Petitioners' references to the due process clause of Amendment XIV, Constitution of the United States, in paragraph 4, Motions to Quash Attachment (R. JIG, pp. 11-13; R. JRH, pp. 10-12) and argument of counsel in the matter of Petitioner J. Robert Huie, (R. JRH, p. 15) are clearly directed to an alleged denial of due process because of the respondent's attempt to require the Petitioner's to testify. The equal protection clause of Amendment XIV is never mentioned. The constitutional validity of Rule 25, Section A, has never been challenged until the filing of the Petition for Writ of Certiorari.

Matters neither considered nor ruled on below should not be initially adjudicated in these proceedings. New York Dock Co. v. The Pozman, 274 U. S. 117; Delaware, T. & W. Ry. v. Koske, 279 U. S. 7.

QUESTION E

Do the due process and equal protection clauses of Amendment XIV, Constitution of the United States, preclude disciplinary procedures against an attorney pursuant to Rules Governing the Conduct of Attorneys promulgated by a Board of Commissioners and approved by the Supreme Court of Alabama, which Rules prohibit an attorney from filing an action for divorce with knowledge or reasonable cause to believe that neither party is a bona fide resident of the State where the statutes and decisions construing said statutes require that one party to a divorce proceeding must be a bona fide resident of the state although the statute prescribes no specific period of time to establish residence?

Title 34, Section 29, Code of Alabama, 1940, contains the following provision:

"When the defendant is a non-resident, the other party to the marriage must have been a bona fide resident of this state for one year next before the filing of the bill, which must be alleged in the bill and proved; provided, however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action."

True, the Supreme Court of Alabama in Levy v. Levy, 256 Ala. 629, 59 So. 2d 344, and Hillery v. Hillery, 275 Ala. 617, 157 So. 2d 217, held that no particular or specific period of residency is required in a divorce proceeding. However, one party must be a bona fide resident in order to confer jurisdiction.

There is no conflict between the above quoted Rule Governing the Conduct of Attorneys in Alabama and the above quoted statute and the decisions construing the same.

Courts have traditionally disciplined attorneys where such attorneys are guilty of perpetrating a fraud upon the court. Rule 25-A of the Rules Governing the Conduct of Attorneys in Alabama merely makes effective this well established practice.

CONCLUSION

For reasons stated herein, it is respectfully submitted the Petition for Writ of Certiorari in these cases should be denied.

Respectfully submitted,

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